Dato' Suhaimi bin Ibrahim & Ors v Korsortium Lapangan Terjaya Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-399–02 OF 2013, W-02(IM)(NCC)-411–02 OF 2013 AND W-02(IM)(NCC)-413–02 OF 2013

ABDUL AZIZ ABDUL RAHIM, MOHAMAD ARIFF AND DAVID WONG JJCA

11 NOVEMBER 2013

Civil Procedure — Intervention — Application for — Intervener application in suit commenced by minority shareholders in company — Applicant not a shareholder — Whether aplicant's rights affected — Whether purely commercial interest insufficient to allow intervention — Whether intervention ought to be allowed — Rules of the High Court 1980 O 15 r 6(2)(b)

Hi-Summit ('the first defendant') had 19% shareholdings in Korsortium Lapangan Terjaya Sdn Bhd ('Korsortium'). The appellants alleged that Konsortium owned a highway concession and was reported to have sold the concession for RM1.7 billion. 19% share of RM1.7 billion amounts to RM323,000,000 and Hi Summit hoped to get this amount. However, Hi Summit's 19% shareholdings in Konsortium had been transferred to Ulimas Sdn Bhd and it is contended by the appellants that this transfer was done fraudulently. Hi Summit took legal action in Suit D3-1958 of 2003 ('Suit 1958') to reclaim back the 19% shareholdings in Konsortium. When Suit 1958 was filed the appellants were the owners of all the shares in Hi Summit. However Lim Chew Yin ('the second defendant') became a 60% shareowner in Hi Summit and she decided not to proceed with Suit 1958. The second defendant was simply not interested in reclaiming the 19% shareholdings in Konsortium. The appellants, who had become minority shareholders in Hi Summit were unhappy with the second defendant's action. To ensure that Suit 1958 will not be abandoned through the might of the majority, the appellants had taken out the present originating summons to obtain leave under s 181A of the Companies Act 1965 ('the Act'). The respondents applied to intervene in this originating summons. The learned judicial commissioner ('JC') allowed the respondent's application on the ground that the respondents were the 'beneficiaries of the order of the court to strike out Suit 1958 against them' and hence their legal interests would be directly affected by any order made in the originating summons. The appellants appealed against this decision.

Held, allowing the appeals with costs:

(1) The appellants were merely trying to obtain leave from the court to

ensure that the might of the majority was not abused. This was essentially a dispute between the appellants as minority shareholders and the second defendant as the majority shareholder. How the respondents could be affected by the court's decision in this originating summons was hard to comprehend. They were not shareholders of Hi Summit. They just happened to be the defendants in the Suit 1958 which was struck out. They may be beneficiary of that decision but that did not mean that they had any interest in the dispute between the minority and the majority shareholders in Hi Summit. The only interest which the respondents may have was purely a commercial interest linked to the outcome of Suit 1958. Commercial interest is not an interest envisaged in O 15 r 16 (see paras 15–16).

(2) The consideration in striking out Suit 1958 was the lack of authority on the part of the appellants, while in this originating summons, the considerations were one of good faith and interests of the company as prescribed by s 181B of the Act. The considerations were completely different and the respondents could not have any interest in the s 181B application. This was not a fit case where the respondents ought to be given leave to intervene (see paras 18–19).

[Bahasa Malaysia summary

Hi-Summit ('defendan pertama') memegang saham sebanyak 19% dalam Korsortium Lapangan Terjaya Sdn Bhd ('Korsortium'). Perayu-perayu mendakwa bahawa Konsortium memiliki konsesi lebuh raya dan telah dilaporkan menjual konsesi tersebut sebanyak RM1.7 bilion. 19% syer daripada RM1.7 bilion berjumlah RM323,000,000 dan Hi Summit berharap untuk mendapatkan jumlah ini. Walau bagaimanapun, pemegangan saham Hi Summit sebanyak 19% dalam Konsortium telah dipindahkan kepada Ulimas Sdn Bhd dan ia dihujahkan oleh perayu-perayu bahawa pindahan ini dilakukan secara penipuan. Hi Summit mengambil tindakan undang-undang di dalam Guaman D3–1958 Tahun 2003 ('Guaman 1958') untuk menuntut semula pemegangan saham 19% tersebut di dalam Konsortium. Apbila Guaman 1958 difailkan perayu-perayu adalah pemilik kesemua saham-saham di dalam Hi Summit. Walau bagaimanapun Lim Chew Yin ('defendan kedua') menjadi pemilik saham sebanyak 60% di dalam Hi Summit dan dia memutuskan untuk tidak meneruskan dengan Guaman 1958. Defendan kedua hanya berminat dalam menuntut balik pemegangan saham sebanyak 19% dalam Konsortium. Perayu-perayu, yang menjadi pemegang saham minoriti dalam Hi Summit tidak berpuas hati dengan tindakan defendan kedua. Untuk memastikan bahawa Guaman 1958 tidak dibatalkan melalui kekuatan majoriti, perayu-perayu telah memulakan saman pemula ini untuk mendapatkan kebenaran di bawah s 181A Akta Syarikat 1965 ('Akta'). Responden-responden memohon untuk mencelah dalam saman pemula ini. Pesuruhjaya kehakiman yang bijaksana ('PK') membenarkan permohonan

responden atas alasan bahawa responden-responden adalah 'beneficiaries of the order of the court to strike out Suit 1958 against them' dan maka kepentingan undang-undang mereka akan terjejas secara terus dengan apa-apa perintah yang dibuat dalam saman pemula tersebut. Perayu-perayu merayu terhadap keputusan ini.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Perayu-perayu hanya cuba mendapatkan izin daripada mahkamah untuk memastikan bahawa kekuatan majoriti tidak disalah guna. Pada dasarnya pertikaian ini adalah di antara perayu-perayu sebagai pemegang saham minoriti dan defendan kedua sebagai pemegang saham majoriti. Bagaimanapun responden-responden boleh terjejas dengan keputusan mahkamah dalam saman pemula ini adalah sukar untuk difahami. Mereka bukan pemegang saham Hi Summit. Mereka adalah defendan-defendan dalam Guaman 1958 yang mana dibatalkan. Mereka mungkin benefisiari keputusan tersebut tetapi ia tidak bermaksud bahawa mereka mempunyai apa-apa kepentingan di dalam pertikaian di antara pemegang saham minoriti dan majoriti di dalam Hi Summit. Satu-satunya kepentingan yang mungkin responden-responden miliki adalah semata-mata kepentingan komersial yang dikaitkan kepada keputusan Guaman 1958. Kepentingan komersial adalah bukan kepentingan yang dibayangkan di dalam A 15 k 16 (lihat perenggan 15–16).

(2) Pertimbangan untuk membatalkan Guaman 1958 adalah kekurangan kuasa di pihak perayu-perayu, sementara dalam saman pemula ini, pertimbangan adalah satu niat baik dan kepentingan syarikat seperti dinyatakan oleh s 181B Akta. Pertimbangan adalah sangat berbeza dan responden-responden tidak boleh mempunyai apa-apa kepentingan dalam permohonan s 181B tersebut. Ini bukanlah kes yang wajar di mana responden-responden patut diberikan kebenaran untuk mencelah (lihat perenggan 18–19).]

Notes

For cases on application for, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4521–4533.

Cases referred to

Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis [1991] 2 MLJ 27; [1991] 2 CLJ 862, SC (refd)

Sistem Penyuraian Trafik KL Barat Sdn Bhd v Kenny Heights Development Sdn Bhd & Anor [2009] 3 MLJ 809; [2009] 1 LNS 52, CA (refd)

Legislation referred to

Companies Act 1965 ss 181A, 181B
Rules of the High Court 1980 O 15 r 6

Appeal from: 24NCC-422–11 of 2012 (High Court, Kuala Lumpur)

Su Tiang Joo (Teh Eng Lay with him) (Cheah Teh & Su) for the appellant.
Ang Hean Leng (Yong Shih Han with him) (Lee Hishammuddin Allen & Gledhill) in Civil Appeal No W-02 (1M) (NCC)-399–02 of 2013 for the respondent.
VL Yiew (CH Yeoh & Yiew) in Civil Appeal No W-02 (1M) (NCC)-411–02 of 2013 for the respondent.
Tan Jee Tjun (Thomas Philip) in Civil Appeal No W-02 (1M) (NCC)-412–02 of 2013 for the respondent.
R Jayasingam (BH Lawrence & Co) for Hi Summit.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] Before us are three appeals which all counsel have agreed to be heard together as they are interrelated and concerned only one judgment in which the learned judicial commissioner allowed the respondents' application to intervene in this originating summons taken out by the appellant under s 181A of the Companies Act.

[2] We heard the appeal and having given due consideration to respective submissions, we allowed the appeals and now give our grounds.

BACKGROUND FACTS

[3] The factual matrix is largely undisputed and they are these. Hi- Summit ('the first defendant in this suit') had 19% shareholdings in Korsortium Lapangan Terjaya Sdn Bhd ('Korsortium'). It is alleged by the appellants that Konsortium owned a highway concession which recently had been reported to have sold the concession for the sum of RM1.7billion. 19% share of RM1.7billion amounts to RM323,000,000 and it is this amount that Hi Summit hopes to get its hand on so to speak.

[4] However, Hi Summit's 19% shareholdings in Konsortium had been transferred to Ulimas Sdn Bhd and it is contended by the appellants that this transfer was done fraudulently. Hence Hi Summit took legal action in Suit D3–1958 of 2003 ('Suit 1958') to reclaim back the 19% shareholdings in Konsortium.

[5] In 2003 when Suit 1958 was filed the appellants were the owners of all the shares in Hi Summit. However on 21 March 2011, Lim Chew Yin ('the second defendant here') became a 60% shareowner in Hi Summit when this court in Civil Appeal W-02(NCVC)-3549 of 2010 upheld her claim as the beneficial owners of 60% shareholdings in the same. Leave to appeal to the Federal Court by the appellants against that decision was rejected on 13 August 2012.

[6] Prior to the disposal of the leave hearing in the Federal Court, the second defendant on 12 April 2011 appearing through her counsel informed the High Court that she as a majority shareholders in Hi Summit does not want to proceed with Suit 1958. Upon being informed and having heard respective submissions from counsel, the High Court struck out Suit 1958, resulting in an appeal to this court in Civil Appeal W-02(IM)-1124 of 2011 ('Appeal 1124').

[7] On 31 October 2012, which is after the Federal Court's rejection of leave to appeal, Lim Chew Yin filed a motion in this court to strike out Appeal 1124 as she also does not want to proceed with it. The upshot of her action is simply that she is not interested in reclaiming the 19% shareholdings in Konsortium.

[8] The appellants, as a result of the victory of Lim Chew Yin in reclaiming her 60% shareholdings in Hi Summit, became minority shareholders in Hi Summit and as minority shareholders, they are most unhappy with the action of Lim Chew Yin in abandoning the claim of 19% in Konsortium. To ensure that Suit 1958 will not be abandoned through the might of the majority, they now launch this originating summons to obtain leave under s 181A of the Companies Act. The respondents in these three appeals now want to intervene in this originating summons.

HIGH COURT DECISION

[9] The learned judicial commissioner sustained the application of the respondents to intervene and her reasons are these. The respondents in her view 'are the beneficiaries of the order of the court to strike out Suit 1958 against them' and hence their legal interests would be directly affected by any order made in this originating summons. It is also her view that this originating summons is nothing but an attempt to circumvent the striking out of Suit 1958 and their lack of authority to prosecute Suit 1958.

OUR GROUNDS OF DECISION

[10] The respondents' application is premised on O 15 r 6 which reads as follows:

6. Misjoinder and non-joinder of parties (O. 15 r. 6)

(1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application-

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely -

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

(3) An application by any person for an order under paragraph (2) adding him as a party shall, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

(4) A person shall not be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

[11] The appellants' originating summons is premised on s 181A and 181B of the Companies Act which read as follows:

(1) A complainant may, with the leave of the Court, bring, intervene in or defend an action on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

Section 181B states as follows:

(1) An application for leave of the Court under section 181A shall be made by originating summons and no appearance need to be entered.

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(2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A.

(3) Where leave has been granted pursuant to an application under section 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

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(4) In deciding whether or not leave shall be granted the Court shall take into account whether —

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave be granted.

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ISSUE FOR DETERMINATION

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[12] There is little doubt that the issue is simply this:

Whether the respondents' interests are the interests envisaged in O15 r 6 of the 2012 High Court Rules?

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[13] In the case of *Arab Malaysian Merchant Bank v Jamaludin Dato' Mohd Jarjis* [1991] 2 MLJ 27; [1991] 2 CLJ 862 in delivering judgment of the Supreme Court Gunn Chit Tuan SCJ explained as follows:

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(a) One of the principal objects of O 15 r 6 of RHC 1980, which replaced O 16 r 11 of Rules of Supreme Court 1967, is to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without giving this person an opportunity of being heard.

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(b) However, as stated by the Privy Council in the *Pegang Mining Co Ltd v Choong Sam & Ors* [1973] 1 LNS 107 case, to achieve that object calls for a flexibility of approach which made it undesirable in that case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases.

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A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

[14] In the case of *Sistem Penyuraian Trafik KL Barat Sdn Bhd v Kenny Heights Development Sdn Bhd & Anor* [2009] 3 MLJ 809; [2009] 1 LNS 52 this court puts the test as follows:

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… whether a person's 'legal interest', and not merely his commercial interest, would be affected. The question is: will a person's rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an

order which may be made in the action? (See Pegang Mining Co Ltd, at p 56 per Lord Diplock; and Tohtonku Sdn Bhd, at p 65, per Mohamed Yusoff SCJ (as he then was)).

[15] Reverting to the case at hand, the appellants in this application are merely trying to obtain leave from the court to ensure that the might of the majority is not abused. In short this is essentially a dispute between the appellants as minority shareholders and Lim Chew Yin as the majority shareholder.

[16] How the respondents can be affected by the court's decision in this originating summons is hard to comprehend. They are not shareholders of Hi Summit, they just happened to be the defendants in the Suit 1958 which was struck out. They may be beneficiary of that decision but that does not mean that they have any interest in the dispute between the minority and the majority shareholders in Hi Summit. As rightly pointed out by learned counsel for the appellants, the only interest which the respondents may have is purely a commercial interest linked to the outcome of Suit 1958. Commercial interest is not an interest envisaged in O 15 r 16.

[17] In any event we are of the view the learned judicial commissioner erred when she failed to consider that at that point in time the striking out decision was still under appeal to this court. It is wrong to assume that this court will uphold the decision of striking out. We also opine that even if leave is granted to the appellants, the respondents will not be prejudiced as they are able to defend themselves in Suit 1958.

[18] Further the consideration in striking out Suit 1958 was the lack of authority on the part of the appellants, while in this originating summons, the considerations are one of good faith and interests of the company as prescribed by s 181B of the Companies Act. The considerations are completely different and how the respondents can have any interest in the s 181B considerations is beyond us.

[19] Accordingly we find that this is not a fit case where the respondents ought to be given leave to intervene.

CONCLUSION

[20] For reasons stated above we allowed the appeals with costs in the sum of RM10,000 for each appeal. We also set aside the High Court decision relating to these three appeals and order that the deposit to be refunded.

Order accordingly.

Appeals allowed with costs.

Reported by Kanesh Sundrum